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Federal Maritime Commission  
Office of the Secretary

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 14 -10**

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**ECONOCARIBE CONSOLIDATORS, INC.**

**COMPLAINANT**

**V.**

**AMOY INTERNATIONAL, LLC.**

**RESPONDENT**

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**RESPONDENT'S OPPOSITION TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

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**1. INTRODUCTION**

Econocaribe bases its motion for partial summary judgment on a "service contract with Econocaribe" and "tariff misdeclaration,"<sup>1</sup> but its Statement of

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<sup>1</sup> For example, see Motion, p. 8 "tariff misdeclaration," p. 9, "service contract with Econocaribe," "classification contained in the Econocaribe - Amoy contract," p. 12 "false classification" (x3), p. 13 "the service contract between Amoy and Econocaribe."

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“Undisputed Facts” and its one affidavit, that of John Kamada, is devoid of any reference *whatsoever* to a service contract<sup>2</sup> and/or tariff between the parties. This omission is reflective of the Rule 56 (e) deficiencies of Econocaribe’s motion.

Even if Econocaribe could somehow resurrect its motion from the 56(e) deficiencies, it still must be denied because material facts remain at issue regarding the shipment. Econocaribe’s motion represents, as undisputed facts, allegations that are disputed by Amoy and preclude summary judgment in this matter.

The facts show that even though Amoy wanted to return the cargo, which was the proper course of action, Econocaribe recommended that Amoy issue a letter of abandonment and that’s what Amoy did: that resulted in the Chinese Customs seizing the cargo.

Finally, one year after the shipment was denied entry by Chinese Customs, Econocaribe notified that Amoy that it needed to return the shipment back to the

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<sup>2</sup> Econocaribe, in Section II. D. of its Motion refers to the terms and conditions of its bill of lading as a service contract. However, Title 46 specifically excludes a bill of lading as a service contract. See, 46 U.S.C. §40102 (20).

United States. Amoy was in the process of finding a shipper when Econocaribe filed this action.

The damages at issue were exacerbated as a result of Econocaribe's failure to take proper action after learning that the cargo was prohibited entry by Chinese Customs, and its subsequent seizure by Chinese Customs and the resulting detention accruing for more than one year.

Based on the foregoing Amoy respectfully requests that the Commission deny Econocaribe's motion for partial summary judgment.

2. **AMOY HAS NOT VIOLATED ANY OF THE STATUTES OR THE CFR SET FORTH IN ECONOCARIBE'S MOTION AND, AT BEST, ECONOCARIBE RAISES DISPUTED ISSUES.**

- a. Econocaribe's motion for judgment under 46 U.S.C. §41104(a) (A) [sic] must be denied since (1) it relies on a "service contract" and tariff that were not alleged in the Statement of Undisputed Facts and (2) Amoy disputes a violation.

Econocaribe's motion seeks judgment under 46 U.S.C. §41104 (2)(A)<sup>3</sup> based on its assertion that Amoy "when entering into a service contract with Econocaribe".... "provided service that is not in accordance with classification contained in the Econocaribe - Amoy Contract." [Motion, p. 9, middle paragraph]. But Econocaribe's Statement of Undisputed Facts and its purported evidence submitted in support of its motion, including the Affidavit of John Kamada, is devoid of any service contract between Amoy and Econocaribe or a "Econocaribe-Amoy Contract." In fact, nowhere in the Statement of Undisputed Facts or in the Affidavit of John Kamada is there a mention of a "service contract" or of a "classification" or of a "Econocaribe - Amoy contract." Yet. Econocaribe's motion is premised on a purported breach by Amoy of a purported service contract with agreed classifications between the parties. Such assertions are set forth on pages 9 and 13 ["The service contract between Amoy and Econocaribe is governed by ...."]<sup>4</sup>

Moreover, even if Econocaribe had complied with Rule 56(e) and provided admissible evidence of a service contract and/or tariff classification

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<sup>3</sup> There is no 46 U.S.C. §41104(a)(A) as alleged on page 8 of Econocaribe's motion. It appears that Econocaribe may be referring to §41104(2) (A).

<sup>4</sup> However, as stated in footnote 2, a bill of lading is not a service contract.

agreement with Amoy, its motion fails because Amoy disputes the material facts at issue and provides factual support for its dispute. Econocaribe alleges that the basis of this breach is that Amoy declared the cargo as auto parts when it was baled tires. However, Amoy has shown that it used due diligence in booking the cargo. It asked for a shipper's letter of instruction, commercial invoice, packing list, and photograph of the cargo. Decl. of Melissa Chen, ¶¶ 3, 4, 5, 29, and 30, Exhibits 4, 5, 6, and 32. Econocaribe has cited no authority that a carrier would be liable under those circumstances.

- b. Econocaribe's claim under 46 U.S.C. §41102( c) must be rejected since its motion fails to provide admissible evidence of Amoy's failure to follow "reasonable regulations and practices."

Econocaribe's argument in section II. B. entitled "§41104( c)," appears to relate to §41102 and thus, §41102( c) is addressed herein. To prevail under §41102( c), Econocaribe had the burden of establishing, with undisputed admissible evidence, practices or non practices of Amoy in violation of subsection ( c). Econocaribe's motion has not a shred of admissible evidence that Amoy failed "to establish, observe, and enforce just and reasonable regulations and practices." Amoy booked the shipment in the same manner that it booked other

shipments, requesting a commercial invoice, shipper's letter of instruction, packing slip and a photograph of the cargo. Econocaribe has cited no authority that Amoy's booking practices in booking the disputed cargo were a violation of §41104( c).

Econocaribe argues that Amoy's practice was not just and reasonable "because abandonment in China is simply not possible." However, Econocaribe fails to mention that it recommended to Amoy that it abandon the cargo when Amoy wanted to return the cargo at the earliest possible time. See Decl. of Melissa Chen, ¶¶8, 9, 11, 12, 13, and 14; Exhibits 11 and 12; See also, Amoy's Separate Statement of Disputed Facts, nos. 14, 15, and 16.

It was not until May 2014, almost one year later, that Econocaribe notified Amoy that the shipment could not be abandoned and that Amoy must nominate a shipper or consignee. Amoy thereafter attempted to do so. Amoy was in the process of finding a shipper when Econocaribe filed the complaint with the FMC. See Decl. of Melissa Chen, ¶25; Separate Statement of Disputed Facts, no. 20.

In the least, Econocaribe must identify, with admissible evidence, how

Amoy failed to establish, observe and enforce practices that violate 46 U.S.C. 41102 ( c). Bald assertions of a violation are insufficient for purposes of a motion for summary judgment. Tapps Brewing 482 F.Supp.2d 1219. Furthermore, it is questionable, and some courts have rejected the idea, that §41102( c) extends to singular allegations of misconduct. Chief Cargo Services, Inc. v. Federal Maritime Commission, \_\_ Fed. Appx. \_\_, 2014 WL 4922152 at \*2 (2<sup>nd</sup> Cir. 2014); Johnson Products Co., Inc. v. M/V La Molinera, 619 F.Supp. 764 (S.D. N.Y. 1985).

- c. 46 CFR 515.31(e) requires a showing by Econocaribe that Amoy knew or had reason to believe that the shipping documents were false or fraudulent. No such evidence exists here.

46 CFR 515.31 provides that an OTI shall not prepare any documents concerning an OTI transaction “*which it has reason to believe is false or fraudulent.*” Emphasis added. Amoy disputes Econocaribe’s unsupported allegation that it had reason to know that it was preparing false documents. To the contrary, Amoy believed that the shipment consisted of new auto parts, not tire bales. It used due diligence in booking the cargo. Declaration of Melissa Chen. ¶¶ 3, 4, 5, 7, 29, 30 and 31, exhibits 4, 5, 6, and 32.

As support for its motion, Econocaribe obliquely refers to "Parties' document production and John Kamada's affidavit" for a finding that Amoy knew that the cargo was used tires at the time of shipment. But there is nothing in the document production that supports a finding that Amoy intentionally presented false documents and/or had reason to believe that it was presenting false documents at the time of the shipment.

As for Mr. Kamada's affidavit, in ¶9, he refers to a telephone conversation that he had with Melissa Chen, one year after the shipment in which Ms. Chen purportedly stated that an Amoy employee had willfully misdescribed the cargo.

Amoy sharply disputes Mr. Kamada's recollection of that telephone conversation and the assertion that it had reason to know at the time of the shipment that it was presenting false information. Decl. of Melissa Chen, ¶¶ 3, 4, 5, 29, and 30, Exhibits 4, 5, 6, and 32; Response to "Undisputed" facts, nos. 6 and 7. In the very least, there is a question of fact as to what Amoy "had reason to believe" regarding the four containers at issue. Disputed questions may not be resolved on conflicting affidavits, depositions and other extraneous material, but rather, these questions may only be resolved by trial. Darby v. U.S., 496 F.Supp.

943 (S.D. Ga. 1980); Tapps Brewing, 482 F.Supp.2d at 1220.

- d. The Shipping Act is inapplicable to Econocaribe's claims of fraud and negligence and, moreover, are inapplicable here since no unjust practices are alleged.

Preliminarily, Amoy disputes that the Shipping Act is applicable to Econocaribe's complaint. In Johnson Products Co., Inc. v. M/V La Molinera, 619 F.Supp. 764 (S.D. N.Y. 1985), a shipper brought action against an NVOCC and others under section 10 of the Shipping Act of 1984 based on a purportedly false bill of lading prepared by the NVOCC. In dismissing plaintiff's claims under the Shipping Act, the Court held as follows, at 766:

The legislative history of the 1984 Act makes clear, however, that behavior such as fraud and negligence does not come within the ambit of the Act. See H.R.Rep. No.98-53, 98<sup>th</sup> Cong., 2d Sess. 34, reprinted in 1984 U.S. Code Cong. & Ad.News 167, 200. Furthermore, the Court is not aware of any cases that hold fraud or negligence to be a violation of section 17 of the 1916 Act.

"The Shipping Act's primary purpose is to eliminate discriminatory treatment of shippers and carriers." Sea-Land Service, Inc. v. Murrey & Son's Co., Inc., 824 F.2d 740, 741 (9<sup>th</sup> Cir. 1987).

Even if the Shipping Act applied here, Econocaribe has failed to establish undisputed facts that Amoy knowingly and willingly gave it false information. In subsection D of Econocaribe's motion, it alleges a violation of 10(a) (1) of the Shipping Act in that Amoy knowingly and willfully gave Econocaribe "false classification in order to obtain the rate Amoy eventually was charged." [Motion, p. 12.] However, Amoy disputes this factual allegation and has presented facts that it did not know that the cargo, when booked, was baled tires. Declaration of Melissa Chen, ¶¶ 3, 4, 5, 29, 30 and 31, exhibits 4, 5, 6, and 32; Response to "undisputed" facts, nos. 6 and 7.

In regards to subsection E. of Econocaribe's motion, Econocaribe relies on §10(b) (1) of the Shipping Act but fails to provide credible evidence that Amoy obtained "false classification." As stated above, Amoy did not know that the shipment had used tires rather than new auto parts and has provided evidence to support its position. Decl. of Melissa Chen, ¶¶ 3, 4, 5, 29, and 30, Exhibits 4, 5, 6, and 32; Response to "Undisputed" facts, nos. 6 and 7.

In its subsection F., Econocaribe alleges that Amoy violated section 10(b)(2)(A). Section 10(b)(2)(A) prohibits a common carrier from providing

service in the liner trade that is not in accordance with a published tariff or service contract. [Motion, p. 13, first full paragraph.] But as noted above, there is no service contract or published tariff asserted by Econocaribe in its Statement of Undisputed Facts nor in the Affidavit of Mr. Kamada. Econocaribe appears to refer to the terms and conditions of its bill of lading. However, a bill of lading is not a service contract. 46 U.S.C. §40102 (2). Thus, Econocaribe's motion under 10(b)(2)(A) fails to meet even the most preliminary requirement.

Furthermore, Econocaribe's motion refers to "Amoy's breach of warranty." That warranty, Econocaribe asserts, is contained in Clauses 14.3 and 15.3 of the service contract between Amoy and Econocaribe. [motion p. 13, second full paragraph.] Econocaribe alleges that breached the warranty by "giving false, illegal declaration." for the shipment at issue. [motion, p. 14, first paragraph.] Econocaribe's assertion, while strongly denied by Amoy, is not a matter within the purview of the FMC and/or the Shipping Act. Johnson Products, supra. Moreover, the allegations that Econocaribe make in support of this violation, namely that Amoy misdeclared the cargo, have been addressed earlier in this opposition. Specifically, Amoy has shown that it was unaware that the cargo was other than what it stated to Econocaribe, auto parts.

3. **SUMMARY JUDGMENT SHOULD NOT BE GRANTED HERE  
BECAUSE MATERIAL FACTUAL ISSUES ABOUT AMOY'S  
KNOWLEDGE OF THE CHARACTER OF THE CARGO REMAIN  
IN DISPUTE.**

Econocaribe, as Complainant, bears the burden in regards to its motion for summary judgment of demonstrating its initial and ultimate burden of demonstrating legal entitlement to summary judgment. It cannot prevail on its motion if any essential element of its claim requires trial. Lopez v. Corporacion Axucarera de Puerto Rico, 938 F.2d 1510 (1<sup>st</sup> Cir. 1991). Without such a showing by the moving party, with admissible evidence, the nonmoving party is not required to come forward with evidence to support each and every element of its claims. Logan v. Commercial Union, 96 F.3d 971 (7<sup>th</sup> Cir. 1996). Here, Amoy has presented evidence to dispute Econocaribe's allegation that Amoy violated its duties under various statutes and the CFRs.

Even if Econocaribe had produced an applicable service contract, summary judgment is not appropriate because an issue of fact remains as to which party caused the detention to accrue. In Western Transportation Co. v. Wilson and Co., Inc., 682 F.2d 1227 (7<sup>th</sup> Cir. 1982), the court of appeal held that the

carrier's motion for summary judgment was improperly granted, where the carrier's tariff provided that the shipper must pay storage costs for goods if it was an act or omission of the shipper that forced the carrier to store them, since the issue of whether the shipper had caused the carrier to store freight was a genuine fact issue in that it had probative force as to the controlling issue.

**4. ECONOCARIBE HAD A DUTY TO MITIGATE ITS DAMAGES**

Econocaribe, as carrier, had a duty to mitigate its losses. Poliski Line Oceaniczne v. Hooker Chemical Corp., 499 F.Supp. 94 (S.D.N.Y. 1980).

Econocaribe is the entity listed on Maersk's bill of lading as the shipper and thus, had constructive possession of the shipment since the day on which Econocaribe received the shipment. Amoy looked to Econocaribe to provide its guidance and direction on what to do with the cargo. See Decl. of Melissa Chen, ¶12. Exhibit 12; Response to Undisputed Facts, no. 14. For one year, Econocaribe took no action other than to request a letter of abandonment from Amoy. Amoy promptly did as instructed and provided that letter of abandonment.

## 5. CONCLUSION

Amoy respectfully requests that the Commission deny Econocaribe's motion for partial summary judgment on the following basis:

- (1) Econocaribe's motion is deficient under Rule 56(e).
- (2) Material facts remain disputed, including whether or not Amoy knew or should have known that the cargo being shipped was used tires rather than new auto parts.
- (3) The statutory schemes upon which Econocaribe bases its motion are not applicable here.
- (4) Damages were incurred by Econocaribe as a result of its failure to mitigate its loss by not taking proper action, before the cargo was seized by Chinese Customs.

Dated: January 19, 2015

Respectfully submitted,  
RUSSELL, MIRKOVICH & MORROW

By:

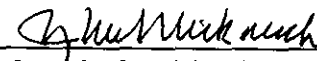
  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **RESPONDENT'S**  
**OPPOSITION TO PARTIAL SUMMARY JUDGMENT** was sent to the  
below-mentioned counsel via email on January 19, 2015.

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